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Constitutional Law--Unlawful Search and Seizure--Evidence Obtained Thereby Not Admissible in State Courts

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except household or works of necessity or charity and provides a fine of not less than ten dollars upon conviction. Section 18 makes provision for the exclusion from section 17 of "any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath and actually refrains from all secular business and labor on that day." W. VA. CODE ch. 61, art. 8, § 18 (Michie Supp. 1959).

While the West Virginia Sunday law appears never to have been tested on constitutional grounds, the West Virginia Supreme Court intimated by dicta in *State v. Baltimore & O. R.R.*, 14 W. Va. 362 (1884), that the West Virginia Sunday law was not intended to enforce the observance of Sunday as a religious duty and, hence, was not a law respecting the establishment of religion. While this appears to be the only judicial pronouncement on the constitutionality of West Virginia's Sunday law, the decisions in the instant cases would seem to remove any doubt as to constitutionality. The Virginia Supreme Court, relying upon the instant cases, has already handed down a decision holding Sunday laws to be constitutional. *Mandell v. Haddon,* 121 S.E.2d 516 (Va. 1961).

Nothing really new has come forth from the Court in these four decisions. They merely affirm the majority position developed in this country with reference to Sunday laws. Sunday laws are to be upheld, it would appear, not as laws of religious significance, but as a proper exercise of the police power of the state in providing for and safeguarding the health and welfare of the people.

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Three police officers, looking for a person wanted in connection with some local bombings, approached *D's* residence and were refused admission without a search warrant. The policemen later returned and forcibly gained admittance. *D* was then taken forcibly upstairs where the police, in their search, found some obscene materials. *D* was ultimately convicted for possession of these materials. At the trial no search warrant was produced, nor was the failure to produce one explained. The Ohio Supreme Court ruled that, even if the evidence was unconstitutionally obtained it

was admissible at the trial. *Held,* overruling *Wolf v. Colorado,* 338 U.S. 25 (1949), evidence obtained in violation of the fourth amendment is inadmissible in state courts because it violates the due process clause of the fourteenth amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961).

It has long been recognized that evidence obtained in violation of the fourth amendment is not admissible in federal courts. *Weeks v. United States,* 232 U.S. 383 (1913). Since the *Weeks* case, the members of the Court have not been in accord as to the extent of its application. The exclusionary doctrine had been limited to the federal courts. This led to the "silver platter" doctrine under which evidence obtained unlawfully by state officers was admissible in federal courts. This practice was only recently held improper in *Elkins v. United States,* 364 U.S. 206 (1960); see generally Comment, 63 W. VA. L. REV. 56 (1961). The *Mapp* case now appears to have settled, once and for all, that evidence obtained through illegal search and seizure in violation of the fourth amendment is not admissible in either federal or state courts.

The constitutional reasoning behind the early cases was that admission of such evidence was a violation of both the fourth and fifth amendments. The former was violated by the unlawful search and seizure itself, and the latter was violated since admission of a defendant's personal papers and belongings as evidence was in effect requiring him to testify against himself. *Weeks v. United States, supra; Boyd v. United States,* 116 U.S. 616 (1885). Until the *Mapp* case, the Court had felt that the exclusionary rule was a matter of judicial implication, and was not derived from the explicit requirements of the fourth amendment. *Wolf v. Colorado, supra.* The *Mapp* and *Elkins* cases, however, have advanced the theory that the rights guaranteed in the fourth and fifth amendments are absolute rights provided by the Constitution, and as such enforceable against the states through the due process clause of the fourteenth amendment.

West Virginia has long been a proponent of the exclusionary rule and will be affected very little by the change. *State v. Wills,* 91 W. Va. 659, 114 S.E. 261 (1922). However, as a result of this change at least twenty-four states will find it necessary to alter their rules of evidence in criminal proceedings. See *Elkins v. United States, supra,* appendix to the opinion of the Court, Table I, for the states affected by the change.

Proponents of the exclusionary rule reason that it reduces abuses of personal rights by police officers. Even though all the courts in this country are opposed to unlawful searches and seizures as such, still the admissibility of evidence so obtained tends to encourage officers to violate basic rights guaranteed by the Constitution.

Those who oppose the exclusionary rule reason that its effect is to permit many crimes to go unpunished. They maintain that the fact that a crime has been committed and proven is sufficient justification for admission of the evidence, and that the important objective is punishment of the guilty. They also contend that there are adequate remedies provided for such abuses and that the defendant should not be entitled to the further benefit of the exclusionary rule. *Irvine v. California,* 347 U.S. 128 (1954); *People v. Defore,* 242 N.Y. 13, 150 N.E. 585 (1926).

Problems other than the conflict on the soundness of this decision appear almost certain to arise. The rule that evidence obtained in violation of the fourth amendment is inadmissible prompts the question as to just what will constitute a violation of the fourth amendment. In *Trupiano v. United States,* 334 U.S. 699 (1948), the Court answered this question in part by saying it is a cardinal rule that a search warrant must be obtained wherever possible. However, just two years later, in *United States v. Rabinowitz,* 239 U.S. 56 (1950), the Court overruled this case and held the test is not whether it was reasonable to obtain a warrant, but rather, whether the search itself is reasonable.

Another problem has already arisen in *Bolger v. Cleary,* 293 F.2d 368 (2d Cir. 1961), wherein the evidence was obtained in violation of a federal statute. The district court issued an injunction forbidding a federal officer and a waterfront official to testify in the criminal prosecution or at the State Waterfront Commission proceedings against the defendant. The appellate court expressed the view that this injunction may not have been necessary under the exclusionary rule of the *Mapp* case, which leaves unresolved several issues such as its application to federal statutes or rules, and to state administrative proceedings. The dissenting opinion says it clearly applies only to violations of the fourth amendment.

In *Williams v. Ball,* 294 F.2d 94 (2d Cir. 1961), the court held that the *Mapp* case did not require it to exclude evidence procured in violation of the Federal Communications Act. This

case relies on *Pugach v. Dollinger,* 365 U.S. 458 (1960), which held the rule in *Schwartz v. Texas,* 344 U.S. 199 (1952), that evidence obtained in violation of a federal statute is admissible in state courts, is still in effect. Whether or not the *Schwartz* case, which relied heavily on *Wolf v. Colorado, supra,* is still the law remains to be seen.

The *Mapp* rule has been discussed in two other recent cases. In *Marcus v. Property Search Warrants,* 367 U.S. 717 (1961), the Court held that evidence obtained by a general search warrant issued in violation of the fourth and fourteenth amendments was inadmissible in a criminal proceeding. In *People v. Figueroa,* 30 U.S.L. WEEK 2158 (Kings County Ct., N.Y. Sept. 30, 1961), the county court held that a prisoner could not attack his pre-*Mapp* conviction by showing that it was based on illegally obtained evidence since *Mapp's* ban on states' use of such evidence applies prospectively only.

In *Rochin v. California,* 342 U.S. 165 (1952), the Court held that evidence obtained unlawfully by the use of a stomach pump was a violation of the due process clause of the fourteenth amendment. The Court recognized *Wolf v. Colorado, supra,* but held that this type of search and seizure shocked the conscience of the Court and offended its sense of fair play. The fact that the search and seizure in the *Mapp* case was similarly shocking may tend to give grounds for distinguishing *Mapp* from the general line of cases and put it in line with *Rochin v. California, supra.* However, by the same token, the fact that the Court did not rely on the *Rochin* case may be even a greater reason for believing that the Court did what it intended to do, overrule *Wolf v. Colorado.*

Regardless of whether the exclusionary rule is good or bad, it is clear that the Court in attempting to settle and clarify the law may have in fact further confused it. The cases decided since the *Mapp* case show confusion as to the scope and application of the rule. Thus while this exclusionary rule has resolved one problem, it has created new problems with respect to its scope and application.

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